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September 17, 2003

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Re: ***Notice of Ex Parte Presentation***
Petition of US LEC Corp. for a Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic, CC Docket No. 01-92

Dear Ms. Dortch:

In accordance with section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, ITC^DeltaCom Communications Inc., d/b/a ITC^DeltaCom, through its attorneys, files this notice of *ex parte* presentation. On September 16, 2003, Jerry Watts, ITC^DeltaCom, and Robert Aamoth and I, counsel to ITC^DeltaCom, met with Debra Weiner and Jeffrey Dygert from the Office of General Counsel and Steve Morris and Victoria Schlesinger from the Pricing Policy Division of the Wireline Competition Bureau, to discuss the above-referenced petition.

During the meeting, ITC^DeltaCom urged the Commission to deny US LEC's petition for declaratory ruling, and emphasized that US LEC's scheme was unlawful under existing precedent. ITC^DeltaCom also addressed the issues raised in the attached written *ex parte* presentation, which it distributed during the meeting.

Please contact me at (202) 887-1234 if you have any questions regarding this filing.

Sincerely,

Jennifer M. Kashatus

Attachment

cc: Debra Weiner (via email)
Jeffrey Dygert (via email)
Steve Morris (via email)
Victoria Schlesinger (via email)
Gregory Vadas (via email)
Qualex International (via email)

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September 11, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Re: ***Notice of Ex Parte Presentation***
CC Docket Nos. 96-262 and 01-92

Dear Ms. Dortch:

On behalf of ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), we are responding to the *ex parte* letter submitted to the Commission on behalf of US LEC Corporation ("US LEC") in support of its Petition for Declaratory Ruling in CC Docket No. 01-92 on August 25, 2003. *See* Letter from R. Rindler, Counsel for US LEC, to M. Dortch, FCC (Aug. 25, 2003) ("*US LEC Letter*").

In its letter, US LEC attempts, yet again, to argue that it is lawful for US LEC to impose the full benchmark CLEC access charge on interexchange carriers ("IXCs") in its FCC exchange access tariff when it performs a nominal and wholly unnecessary routing function for CMRS-originating traffic even though the CMRS carrier is precluded from collecting a tariffed access charge of its own. US LEC concedes that it "shares" a portion of its tariffed access charge revenues with the CMRS carrier, who is thereby effectively able to impose access charges indirectly on IXCs for its traffic.

It should be noted that US LEC is no stranger to nefarious routing and compensation schemes. Several years ago US LEC implemented a scheme whereby it used auto-dialers to generate phony minutes solely for the purpose of generating reciprocal compensation revenues. Once this unattractive practice was discovered, it was roundly condemned by regulatory authorities and the industry as a whole. *See, e.g., BellSouth Telecommunications, Inc. v. US LEC of North Carolina Inc., Order Denying Reciprocal Compensation,* Docket No. P-561,

Sub 10 (N.C.U.C. Mar. 31, 2000). No doubt US LEC took the position then, as it is doing now, that its routing scheme was "perfectly legal" under a self-serving interpretation of applicable statutes and case law. The Commission should be no more fooled by these assertions here than the North Carolina Commission was in the auto-dialer case. US LEC's access charge scheme is, and always has been, patently unlawful under Commission rules and policies, to say nothing of the ongoing and unchanged prohibition against unjust and unreasonable practices in Section 201(b) of the Communications Act of 1934.

In the following sections, we briefly address some of the more salient issues raised in US LEC's August 25 letter.

I. FCC RULE 69.5

Throughout its letter, US LEC relies upon FCC Rule 69.5 as the source of its authority to tariff an interstate access charge for CMRS-originating traffic. However, Rule 69.5 applies only to the exchange access services offered by incumbent local exchange carriers ("ILECs"). *Compare* FCC Rule 69.1(a) ("[t]his part establishes rules for access charges for interstate or foreign access services provided by telephone companies") *with* FCC Rule 69.2(hh) (defining the term "telephone company" to mean an incumbent local exchange carrier); *see also Sprint Communications Company*, 15 FCC Rcd 14027, ¶ 6 (2000) ("a CLEC . . . is not subject to our part 69 access-charge rules"). US LEC is not now, and never has been, an ILEC, and therefore US LEC is not now, and never has been, authorized by FCC Rule 69.5 to impose "carrier's carrier" charges on IXCs.

II. THE CLEC BENCHMARK ORDER

US LEC defends its access charge practices against claims that they are flatly inconsistent with the Commission's decision in *Access Charge Reform*, 16 FCC Rcd 9923 (2001) ("*CLEC Benchmark Order*"), by arguing that (i) its practices are authorized under 47 C.F.R. § 69.5; and (ii) the *CLEC Benchmark Order* did not purport to modify that rule. However, as just demonstrated, FCC Rule 69.5 does not govern CLEC access charges, and hence US LEC's putative syllogism falls of its own weight.

Moreover, the *CLEC Benchmark Order* repudiates US LEC's imposition of the full benchmark rate on IXCs when it performs at most a limited transport function for these CMRS-originating calls. The *CLEC Benchmark Order* permits US LEC to tariff the full benchmark rate only when it performs all the originating functions for a switched interstate telephone call. The Commission specifically identified those functions as including common line, local switching, and transport. *CLEC Benchmark Order*, 16 FCC Rcd at 9946, ¶ 55 & n.126; *see also* 47 C.F.R. § 61.26(a)(3). Although the Commission was careful not to dictate the rate elements or rate structure that a CLEC can charge for its access services, the Commission

underscored that the benchmark rate is an aggregate rate reflecting "a per-minute cap for *all* interstate switched access service charges." *Id.* at ¶ 55 (emphasis supplied). In its rules, the Commission defined the benchmark rate by reference to "the *composite*, per-minute rate for these services, including *all* applicable fixed and traffic-sensitive charges." 47 C.F.R. § 61.26(a)(5) (emphasis supplied). In prescribing the benchmark rate, the Commission relied upon record data regarding the rates charged by CLECs for providing all switched access functions. *See, e.g., CLEC Benchmark Order*, 16 FCC Rcd at 9942-9945, ¶¶ 48-52. It would plainly defeat the Commission's avowed purpose of eliminating regulatory arbitrage opportunities while aligning CLEC access charges with ILEC rate levels (*id.* ¶¶ 3, 108) to permit any CLEC to impose the full benchmark rate for providing a mere subset of the functions necessary to originate switched interstate traffic.

In the case at hand, there is no dispute that the CMRS carrier, not US LEC, provides several of the originating access functions, including the common line and local end office switching functions. US LEC performs a limited function by (gratuitously) inserting itself into the routing configuration whereby calls are transported from the CMRS carrier's MTSO to the ILEC's access tandem, where the calls are handed-off to the IXC. It is undisputed that US LEC does not perform all the originating functions for these calls, and therefore US LEC is not entitled under the *CLEC Benchmark Order* to tariff the full benchmark rate.

By imposing the full benchmark rate on IXCs for CMRS-originating traffic, US LEC is effectively billing customers for services that it does not provide. The Commission has previously prohibited this practice, which is a direct violation of the prohibition in section 201(b) against unjust and unreasonable practices. *See, e.g., AT&T Corp., et al. v. Bell Atlantic – Pennsylvania, et al.*, 14 FCC Rcd 556, ¶ 32 (1998) (stating that carriers can recover costs only for those functions actually performed); *see also Bell Atlantic Tel. Cos. Revisions to FCC Tariff No. 1*, 6 FCC Rcd 4794 ¶ 6 (1991) (stating that a LEC cannot bill for common line charges for CMRS-originated traffic). In effect, US LEC finds itself between a rock and a hard place. If US LEC claims that its tariffed access rate reflects all originating switched access functions (including those provided by the CMRS carrier), then it is admitting that it is tariffing switched access charges on behalf of the CMRS carrier, which is impermissible under the *Sprint PCS* decision (see below). If it claims that its tariffed access rate reflects only the specific functions that it provides, then it loses any protection under the safe harbor established in the *CLEC Benchmark Order*. Either way, US LEC's practice is unlawful.

In a separate *ex parte* letter dated August 25, 2003, US LEC belatedly opposes the "Petition for Clarification or, in the Alternative, Reconsideration" submitted by Qwest Communications International, Inc. on June 20, 2001, in response to the *CLEC Benchmark Order*. In that letter, US LEC focuses on the question whether the Commission should adopt additional rules to prescribe a separate, lower benchmark rate when the CLEC provides a mere subset of the originating (or terminating) exchange access functions. ITC^DeltaCom takes no

position on this issue, nor is it necessary for the Commission to resolve this issue in order to reject US LEC's Petition for Declaratory Ruling. The question here is whether the *CLEC Benchmark Order* authorizes a CLEC like US LEC to impose the full benchmark rate when it provides fewer than all applicable originating access functions. As demonstrated above, the *CLEC Benchmark Order* provides a safe harbor only when the CLEC provides all applicable switched access functions. US LEC does not qualify under that standard, and hence its effort to seek sanctuary in the safe harbor created by the *CLEC Benchmark Order* must fail.

Lastly, US LEC utterly fails to show that permitting any CLEC to tariff the full benchmark rate whenever it "touches" a CMRS-originating call would not lead to abusive behavior. ITC^DeltaCom and other carriers have noted that under US LEC's view of the Commission's policies, it would be permissible for multiple CLECs to participate in the routing of a call between the CMRS carrier's MTSO and the ILEC's access tandem, and then for each CLEC to separately tariff the full benchmark rate on the IXC. *See* ITC^DeltaCom *Ex Parte* at 5 (Apr. 17, 2003). Under this "daisy chain" approach, numerous CLECs could each impose the full benchmark rate for the same call and the IXC would incur costs several times higher than the benchmark rate for each call that it receives. US LEC's response is to encourage the FCC to adopt a new rule limiting this abusive practice to one CLEC (presumably, US LEC itself). *See* US LEC Letter at 8. This self-serving "pull-up-the-ladder" solution to the problem hardly provides a principled policy basis for addressing this issue. Nor is it constructive for US LEC to suggest (*see id.* at 7-8) that IXCs can avoid this problem by the simple expedient of implementing direct interconnection with all CLECs. *Id.* at 8-9. It is neither feasible nor desirable that every IXC should interconnect directly with every CLEC solely to prevent carriers like US LEC from gaming the access charge system.

III. THE SPRINT PCS DECISION

US LEC seeks to side-step the Commission's decision last year in *Sprint PCS*, 17 FCC Rcd 13192 (2002), on the grounds that the Commission did not enunciate a "general policy" and nowhere expressly addressed the precise routing configuration that US LEC has implemented. US LEC Letter at 3-5. As to the former point, the *Sprint PCS* decision was promulgated as a Declaratory Ruling, and it articulated the Commission's view of its current and pre-existing general policies in this area. The Commission clarified that no CMRS provider is entitled to file tariffs imposing interstate access charges on IXCs, and that no Commission rule entitles any CMRS provider to otherwise collect such charges from IXCs. *See Sprint PCS*, 17 FCC Rcd at 13196, ¶ 9. The Commission's ruling reflected "industry practice for 15 years," which required CMRS carriers to recover access costs from their own end users rather than from IXCs. *See id.* at 13199, ¶ 15. The *Sprint PCS* decision is not the "narrow" ruling claimed by US LEC.

US LEC's contention that the Commission did not expressly prohibit the precise routing configuration that US LEC has chosen to implement hardly proves that the configuration is lawful. It is doubtful that the Commission could have written the decision to address every conceivable routing configuration that industry participants might devise. Also, it is worth emphasizing that the *Sprint PCS* decision addressed the only Commission decision that US LEC relies upon as a favorable precedent, and conclusively rejects that decision as providing any authority for the type of routing practice undertaken by US LEC. *Sprint PCS*, 17 FCC Rcd at 13196, ¶ 9. Hence, the *Sprint PCS* decision effectively repudiated US LEC's abusive routing and compensation scheme.

Further, it is clear from the *Sprint PCS* decision that all direct or indirect attempts to tariff interstate access charges for CMRS-originating traffic are contrary to pre-existing Commission rules and policies. The *Sprint PSC* decision is meaningless if a CMRS carrier can effectively impose tariffed access charges on IXCs by the expedient of hiring a CLEC to file the tariff and bill the charges. Moreover, the 15 years' of industry practice whereby CMRS carriers recovered access costs from their end-user subscribers, *Sprint PCS* at ¶ 15, would be overturned were CMRS carriers able to recover access costs through the access charge kickbacks they receive from US LEC.

US LEC cannot justify its unlawful scheme on the pretext that it is implementing meet point billing on behalf of itself and the CMRS carrier. *See* US LEC Letter at 5-6. Meet point billing is not available unless all carriers are allowed to bill their charges directly to the access customer, and in this case the CMRS carriers are precluded from imposing access charges on ITC^DeltaCom absent a contract.

Ultimately, US LEC retreats to the position that the *Sprint PCS* decision was wrongly decided because it allegedly gives IXCs a "free ride" for CMRS traffic and discourages IXCs from entering into interconnection agreements with CMRS carriers. *See e.g.*, US LEC Letter at 16. Of course, US LEC's disagreement with certain FCC policies cannot justify non-compliance with them.

Further, US LEC is wrong to assert that the *Sprint PCS* decision gives IXCs a "free ride" on the backs of CMRS carriers. As the Commission itself stated in the *Sprint PCS* decision, the consistent industry practice for over a decade has been that CMRS carriers recover their access costs from their end-user subscribers. Permitting them to impose tariffed access charges on IXCs would give CMRS carriers a windfall while dramatically increasing the costs incurred by IXCs. (ITC^DeltaCom has calculated that US LEC's imposition of the full benchmark rate for CMRS-originating traffic would increase its costs by approximately 600%.) Moreover, ITC^DeltaCom would note for the record that it has exchanged traffic with CMRS carriers for years without receiving any access revenues from those carriers. Hence, the current industry practice by which CMRS carriers and IXCs do not imposed tariffed access charges on

each other does not advantage either class of carriers. Although US LEC is quick to point out that ITC^DeltaCom has filed its own access tariff for wireless traffic, this recent filing was a defensive measure only. ITC^DeltaCom would be happy to withdraw this tariff should the Commission clarify that the types of routing and billing practices perpetrated by US LEC violate Commission rules and policies as well as section 201(b) of the Communications Act.

US LEC is also wrong when it asserts that allowing CLECs to tariff access charges for CMRS-originating calls will encourage CMRS carriers and IXCs to establish direct traffic exchange agreements. The opposite, in fact, is true. ITC^DeltaCom has sought unsuccessfully to establish a bill-and-keep arrangement or other reasonable payment regime with several wireless carriers. These efforts have failed because these CMRS carriers (some of whom appear on US LEC's customer list, *see* US LEC Letter at 14, are already receiving significant access charge revenues from US LEC and therefore have no incentive to negotiate a reasonable arrangement. In ITC^DeltaCom's view, the consummation of new IXC/CMRS agreements is not likely so long as US LEC's unlawful scheme is permitted to continue.[1]

IV. US LEC HAS KNOWINGLY CONCEALED ITS ROUTING OF TOLL-FREE WIRELESS CALLS

US LEC has gone to great lengths to conceal the fact that it was routing toll-free calls for wireless carriers. Since originally filing its lawsuit against US LEC, ITC^DeltaCom has learned that US LEC was much more subtle in its fraud against ITC than initially believed. US LEC connected to wireless carriers using multi-frequency ("MF") protocol to assure the wireless ANI would not pass to it, rather than stripping these numbers. Prior to March 2001, all of US LEC's connections with wireless carriers used MF connections that blocked or prevented ANI from being transmitted. When ANI was blocked on these wireless calls, US LEC substituted an ANI registered to US LEC and transmitted the call, making the call appear to be a landline call that originated with US LEC.

Although US LEC claims that it was the wireless carriers who chose to use MF, this is not exactly correct. These carriers chose to do so even though their other inter-carrier connections were SS7 and US LEC was SS7-capable. There was no technical reason for US LEC wanting them to use MF. US LEC urged the wireless carriers to use MF because US LEC knew that IXCs would not pay US LEC access charges if the IXCs realized that these calls originated with wireless carriers. US LEC was concerned that the IXCs would refuse to pay the access charge it had agreed to share with the wireless carrier if the IXCs saw that the calls were

[1] Similarly, US LEC erroneously argues that it is promoting competition. To the contrary, US LEC's scheme retards true competition and investment in infrastructure.

coming from wireless carriers.[2] Finally, it was US LEC, not the wireless carriers, who decided to substitute an ANI registered to US LEC in place of the ANI for these wireless calls.

US LEC's contention that it "announced to the world" that calls were wireless when it began using SS7 connections with wireless carriers is totally misleading. US LEC fails to disclose to the Commission that US LEC does not inform the IXCs that the wireless call was routed through US LEC. Thus, while the SS7 signaling information may identify the call as wireless, there is no way that the IXC can distinguish wireless calls routed through US LEC from the millions of other wireless calls it legitimately receives. More importantly, there is no way for the IXC to determine that US LEC is billing the IXC access charges for those wireless calls.

Regardless of whether US LEC routes a toll-free wireless call using MF or SS7, US LEC concealed its role in the routing of the call and its billing of access charges for the call. The US LEC has failed to inform the Commission in its *ex parte* filings that US LEC took these steps to conceal its role because US LEC well knew that IXCs would not pay access charges for wireless calls if they discovered US LEC's routing and billing scheme.

V. RETROACTIVITY

US LEC argues at length that it would violate the well-established doctrine against the retroactive application of new substantive rules for the Commission to hold that US LEC's imposition of access charges on IXCs for CMRS-originating traffic is, and always has been, unlawful. US LEC Letter at 9-13 & Attachment. US LEC is wrong.

It is well-established that the Commission may clarify existing law – regardless whether the Commission considers existing law to be clear or ambiguous – and apply the clarification retroactively. As one Circuit Court has stated: "a clarification of an unsettled or confusing area of law 'does not change the law, but restates what the law according to the agency is and has always been.'" *First National Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999) (*quoting Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 135 (1936)). As another Circuit Court has stated, "[a] clarifying rule, therefore, can be applied to the case at hand just as a judicial determination construing a statute can be applied to the case at hand." *Clay v. Johnson*, 264 F.3d 744, 749 (7th Cir. 2001). In another case, the Court confirmed that the retroactive application of an interpretative rule is "entirely permissible" if no substantive change in law is involved. *Sentara-Hampton General Hospital v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992). Numerous other cases support this proposition. *See, e.g., Farmers*

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[2] The FCC has asked ITC^DeltaCom for documents regarding US LEC but presently Verizon Wireless has a motion for a protective order pending to delay ITC^DelatCom's disclosure of these documents to the FCC. See Non-Party Verizon Wireless (VAW) LLC's Motion for Protective Order to Prohibit ITC^DeltaCom Communications, Inc. from Disclosing Verizon Wireless's Restricted Confidential Information, No. 3:02-CV-116-JTC (Aug. 8, 2003 N.D. Ga).

Telephone Company v. FCC, 184 F.3d 1241, 1250 (10th Cir. 1999); *Piamba Cortes v. American Airlines*, 177 F.3d 1272, 1283 (11th Cir. 1999). Further, courts normally will accord substantial deference to the agency in determining whether a ruling embodies a clarification, which may be applied retroactively, or a brand new rule, which sometimes may not. *See, e.g., Heimmermann v. First Union Mortgage Corporation*, 305 F.3d 1257, 1260 (11th Cir. 2002); *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987).

US LEC has a high hurdle to clear before it can argue that the Commission is prohibited from applying its ruling retroactively. US LEC must show that its access charge compensation scheme was unambiguously lawful under pre-existing Commission rules and policies as well as the just and reasonable standard under section 201(b). If, as ITC^DeltaCom believes, US LEC's practices were plainly unlawful under pre-existing agency policies and statutory provisions, or even if the Commission determines its previous policies to be ambiguous or uncertain in their scope and application, it is permissible to apply them retroactively. What is clear beyond any doubt is that US LEC cannot meet its burden to show that past and present Commission rules and policies affirmatively authorize its abusive routing and compensation schemes.

ITC^DeltaCom requests that the Commission clarify in its ruling that US LEC's practices are, and have always been, contrary to applicable Commission rules and policies, as well as a violation of Section 201(b). Without such a clarification, IXCs and US LEC will continue to have disputes regarding US LEC's outstanding invoices for access charges dating back months if not years. Rather than foment continued disputes and litigation between the parties, the Commission should close the book on these practices by clarifying, once and for all, that they are and have always been unlawful.

Respectfully submitted,

Jennifer Kashatus

Robert J. Aamoth
Jennifer M. Kashatus

Counsel for ITC^DeltaCom Communications, Inc.